SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1974

No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,

Petitioners,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

1. The Sixth Circuit Denied a Railroad Reorganization Court the Supervisory Power to Protect a Debtor's Estate During Reorganization 7

2. Contrary to the Principle of This Court's Nemitz Decision, the Sixth Circuit Held Section 77(n) of the Bankruptcy Act Applicable to Protection Agreements Imposed By the Interstate Commerce Commission 11

3. Denial By the Sixth Circuit of the Trustees' Right to Prove Irreparable Harm to Debtor Calls for the Exercise of This Court's Powers of Supervision 14

Conclusion 20

Appendix: (Printed under separate cover)

Opinion of the Sixth Circuit Court of Appeals, July 5, 1974 ..... A1

Judgment of the Sixth Circuit Court of Appeals, July 5, 1974 ..... A5

Order of Court of Appeals on Rehearing, August 8, 1974 ..... A7

Order No. 71 of the United States District Court, Northern District of Ohio, Eastern Division, March 21, 1973 ..... A8

Memorandum and Order No. 101 of the District Court, May 17, 1973 ..... A10

Supplemental Report and Order of the Interstate Commerce Commission in Finance Docket No. 21510, April 29, 1974 ..... A18

Bankruptcy Act—Section 77(a), 11 U.S.C. § 205(a) A32

Bankruptcy Act—Section 77(n), 11 U.S.C. § 205(n) A33

Railway Labor Act—Section 6, 45 U.S.C. § 156 ..... A34

Interstate Commerce Act—Section 5(2)(f), 49 U.S.C. § 5(2)(f) A34

Interstate Commerce Act—Section 5(11), 49 U.S.C. § 5(11) A35

TABLE OF AUTHORITIES

Cases

Baldwin, Ex parte, 291 U.S. 610 (1934) 7

Brotherhood of Locomotive Eng'rs v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir. 1963) 12

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) 17

Century Inv. Corp. v. United States, 250 F.2d 139 (9th Cir. 1957), *cert. denied sub nom., Ester v. United States*, 356 U.S. 950 (1958) 18

City Line Center, Inc. v. Loew's Inc., 178 F.2d 267 (3rd Cir. 1949) 18

Cockburn v. O'Meara, 141 F.2d 779 (5th Cir. 1944) 18

Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935) 7

Detroit News Pub. Ass'n v. Detroit Typographical Union, 471 F.2d 872 (6th Cir. 1972) 18, 19

Equitable Life Assur. Soc. v. Mercantile Com. B & T Co., 143 F.2d 397 (8th Cir. 1944) 18

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 14, 15, 16, 19

Ford Motor Co. v. NLRB, 305 U.S. 364 (1939) 16

Nemitz v. Norfolk & Western Ry., 436 F.2d 841 (6th Cir. 1971) 11, 12, 13

New Haven Inclusion Cases, 399 U.S. 392 (1970) 7-8

Norfolk & Western R.R. v. Nemitz, 404 U.S. 37 (1971) 11, 12, 13

Norfolk & Western Ry. & New York, Chicago & St. Louis R.R., Merger, etc., Finance Docket No. 21510, 330 I.C.C. 780 (1967) 4

North American Coal Corp. v. U.M.W.A., 497 F.2d 459 (6th Cir. 1974) 18, 19

Order of Conductors v. Pitney, 326 U.S. 561 (1946) 7, 8, 9, 10, 13

Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486 (1968) 4

Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942) 18

Thompson, Trustee, v. Magnolia Petroleum Co., 309 U.S. 478 (1940) 7, 9, 10

Tobin v. Edward S. Wagner Co., 187 F.2d 977 (2nd Cir. 1951) 18

Tower Realty Co. v. City of East Detroit, 185 F.2d 590 (6th Cir. 1950) 18

United States v. Martin, 267 F.2d 764 (10th Cir. 1959) 18

United States v. Morow, 182 F.2d 986 (D.C. Cir. 1950) 18

United States v. Wimbish, 154 F.2d 773 (4th Cir. 1946) 18

Villa v. Van Schaick, 299 U.S. 152 (1936) 15, 16, 19

Walling v. Goldblatt Bros. 128 F.2d 778 (7th Cir. 1942), *cert. denied*, 318 U.S. 757 (1942) 18

Willing v. Binenstock, 302 U.S. 272 (1937) 16

Constitution and Statutes

Constitution of the United States, Fourteenth Amendment 16

Bankruptcy Act:

Section 2, 11 U.S.C. §11 5

Section 77, 11 U.S.C. §205 ..... 4, 5, 7, 8, 20

Section 77(a), 11 U.S.C. §205(a) 3, 7

Section 77(n), 11 U.S.C. §205(n) 3, 6, 8, 11, 12, 13

28 U.S.C. §1254(1) 2

28 U.S.C. §§1336, 1398 and 2321-2325 2

Railway Labor Act:

Section 1 et seq., 45 U.S.C. §151 et seq. 11

Section 6, 45 U.S.C. §156 3

Interstate Commerce Act:

Section 5(2)(f), 49 U.S.C. §5(2)(f) 3, 4, 11

Section 5(11), 49 U.S.C. §5(11) 3, 11

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit

Petitioners, Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Erie Lackawanna Railway Company, Debtor, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 5, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 500 F.2d 34 (6th Cir. 1974) and appears in the Appendix, page A1. Order No. 101 with Memorandum and Opinion of the District Court for the Northern District of Ohio, not reported, appears in the Appendix, page A10. The Supplemental Report of the Interstate Commerce Commission (ICC) in the related case, not yet reported, appears in the Appendix, page A18.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1974 (App. p. A5). A timely Petition for Rehearing was denied on August 8, 1974 (App. p. A7). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case concerns the right of the District Court sitting as the Reorganization Court to conserve assets of the Debtor's estate pending final determination of issues before the ICC. The Trustees filed a petition with the ICC seeking *suspension* during the reorganization of employee protection agreements imposed on the Debtor in an inclusion proceeding.[2] Thereafter the Reorganization Court ordered *impoundment* of the payments accruing under

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[1] The Appendix, separately printed, is hereinafter referred to as "App. p. ( )". The Petitioners are referred to as the "Trustees" and the Respondents as the "Unions".

[2] Now on review to a three-judge court by virtue of a complaint filed by the Trustees in the United States District Court for the Northern District of Ohio, Eastern Division, on September 17, 1974 pursuant to 28 U.S.C. §§ 1336, 1398 and 2321-2325. The ICC denied the Trustees' petition for suspension by Order dated April 29, 1974 pursuant to the Supplemental Report mentioned above (App. p. A18).

such agreements until further order of court. The propriety of the interim action of the Reorganization Court is the subject of this litigation.

The questions presented are:

1. Did not the Reorganization Court have the supervisory power to protect the Debtor's assets by impounding the protection payments pending definitive determination of the right thereto in the appropriate forum?

2. Is not Section 77(n) of the Bankruptcy Act inapplicable to payments to employees governed by protection agreements imposed by the ICC under Section 5(2)(f) of the Interstate Commerce Act as a condition to its approval of a railroad inclusion?

3. Should not the Court of Appeals have remanded the case with directions to the Reorganization Court to take testimony on the question of irreparable harm, rather than resolve that question conclusively against the Trustees by vacating the orders below?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11, §§205(a) and 205(n):
United States Code, Title 45, §156;
United States Code, Title 49, §§5(2)(f) and 5(11).

These are set out in the Appendix at pages A32, A33, A34, A34, and A35, respectively.

STATEMENT OF THE CASE

By order of June 9, 1967, the ICC approved the inclusion of Erie-Lackawanna Railroad Company in the system of Norfolk and Western Railway Company (N&W). The modus was merging Erie-Lackawanna Railroad Company into the Debtor, Erie Lackawanna Railway Company, a wholly-owned subsidiary of Dereco, Inc., itself a subsidiary of N&W. This Court approved the inclusion,[3] which was accomplished on April 1, 1968.

Anticipating consolidations of various facilities and work forces of the Debtor with those of the N&W as a result of the inclusion, the ICC imposed protection agreements upon the Debtor pursuant to Section 5(2)(f) of the Interstate Commerce Act.[4] These agreements provide that the Debtor's employees are not to be deprived of employment or placed in a worse position with respect to compensation as a result of the inclusion. Any employee of the Debtor on April 1, 1968 who was adversely affected by any such consolidation of facilities or work forces became entitled to "protection payments" equal to the difference between his future monthly earnings and the compensation he had been earning during a designated "base" period (App. p. A19).

On June 26, 1972 the Debtor filed a Petition for Reorganization under Section 77 of the Bankruptcy Act, which was approved by The Honorable Robert B. Krupansky, United States District Court for the Northern

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[3] *Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 525-26 (1968).

[4] *Norfolk & Western Ry. & New York, Chicago & St. Louis R.R., Merger, etc.*, Finance Docket No. 21510, 330 I.C.C. 780, 822-26 (1967). The protection agreements imposed on the Debtor in the inclusion proceedings incorporated by reference the terms of the protection agreement approved by the ICC at the time of the N&W-Nickel Plate consolidation in 1964. 389 U.S. 486, 526 (1968); (App. p. A19).

District of Ohio. The Trustees were thereafter appointed and duly qualified. Jurisdiction below was based upon Sections 11 and 205, Title 11 of the United States Code.

The Trustees discovered that only minor consolidations of facilities or work forces with N&W had been made since the April 1, 1968 inclusion. Yet there was an annual drain on Debtor's resources in excess of $1,000,000 because of protection payments to approximately one-sixth of its employees who were not in any way adversely affected because of the inclusion. Furthermore, with control of the Debtor no longer in N&W but in the Trustees, subject to direction of the Reorganization Court, consolidations of facilities or work forces with the N&W pursuant to the inclusion order were not possible. Accordingly, on March 20, 1973 the Trustees filed their petition with the ICC to reopen the prior inclusion proceedings for the purpose of suspending operation of the protection agreements during the course of the reorganization.

Immediately after commencing the proceedings to suspend before the ICC, the Trustees filed their petition in this case with the Reorganization Court. The Trustees requested authorization to impound the "protection payments" by depositing them monthly in an interest-bearing account pending final resolution of the issues before the ICC. On March 21, 1973 the Reorganization Court entered Order No. 71 granting the Trustees' petition, directing them to give notice to intervenors and other interested parties, and stating that the order would become final unless a motion to vacate or other pleading was filed by April 2, 1973 (App. p. A8).

After a hearing upon motions filed by the Unions, the Reorganization Court entered its Memorandum, Opinion and Order No. 101 on May 17, 1973 denying the Unions' motions to vacate Order No. 71. The Reorganization Court stated:

"Order No. 71 was designed to protect the interests of both the employees and the Trustees by preserving the subject matter in dispute until the Interstate Commerce Commission resolves the issues presented by the Petition of the Trustees, thereby assuring the integrity of the accrued funds, including interest thereon, and allaying even the threat of irreparable harm to either side.

Order No. 71 has preserved the status quo by preventing either party from dissipating the assets pending a final determination of the issues before the Commission. Also, Order No. 71 eliminates the necessity of further costly litigation by the prevailing party to receive the fruits of its successful efforts." (App. p. A16).

As of August 1, 1974, $1,157,593 has been impounded pursuant to Order No. 71. In no case have the impounded payments for a given employee constituted all the payments due him or her for a given month. Each employee covered by the protection agreements continues to receive wages based upon his employment with the Debtor. The amounts which have been impounded constitute only the supplement, if any, between an employee's monthly earnings and his base period compensation.[5]

On July 5, 1974, the Court of Appeals for the Sixth Circuit *reversed* the Reorganization Court and *vacated* Orders Nos. 71 and 101 for two reasons: (1) that the protection payments were impounded in violation of the provisions of Section 77(n) of the Bankruptcy Act; and (2) that the Reorganization Court failed to take evidence in order to make findings of fact on irreparable injury (App. p. A1). The Trustees' timely petition for rehearing was denied on August 8, 1974 (App. p. A7).

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[5] Affidavit of Ralph S. Tyler, Jr. filed in support of Motion to Stay Issuance of Mandate in the Sixth Circuit, August 12, 1974.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit Denied A Railroad Reorganization Court The Supervisory Power To Protect A Debtor's Estate During Reorganization.

The two leading cases of this Court on the supervisory powers of a railroad reorganization court are *Order of Conductors v. Pitney*, 326 U.S. 561 (1946), and *Thompson, Trustee, v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). In *Pitney*, this Court approved supplanting one set of conductors with members of another union pending determination of the contractual rights of the contending unions. In *Magnolia*, this Court approved the extraction and sale of oil and impoundment of the proceeds pending determination of legal title thereto. In the present case, the Reorganization Court impounded payments pending determination of the suspension of the agreements under which the payments were being made.

The applicability of *Pitney* and *Magnolia* proceeds from Section 77 of the Bankruptcy Act. 11 U.S.C. § 205 (1970). Section 77(a) provides that a reorganization court shall have exclusive jurisdiction over the debtor and its property during reorganization. This exclusive jurisdiction permits a reorganization court to utilize not only all powers flowing from Section 77, but all powers not inconsistent with Section 77 "which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose" (App. p. A32). See *Continental Bank v. Rock Island Ry.*, 294 U.S. 648 (1935); *Ex parte Baldwin*, 291 U.S. 610 (1934).

In exercising such exclusive jurisdiction, railroad reorganization courts have the responsibility to conserve the debtor's estate for the benefit of creditors and to preserve an ongoing railroad in the public interest. *New Haven In-*

clusion Cases, 399 U.S. 392 (1970). In that case this Court noted:

> "After 35 years of § 77, as amended, it is unnecessary to recanvass the two basic objectives of the statute—the conservation of the debtor's assets for the benefit of creditors and the preservation of an ongoing railroad in the public interest." *Id.* at 431.

In *Order of Conductors v. Pitney*, 326 U.S. 561 (1946), this Court held that a reorganization court has the duty under its supervisory powers to direct its trustees in the conservation of the debtor's assets and the proper administration of the estate. The trustees of the Central Railroad Company of New Jersey, in a Section 77 reorganization, obtained approval of the reorganization court to displace the yard conductors of one union for those of another. The union representing the displaced employees petitioned the reorganization court to enjoin the trustees from such action, contending that a change in working conditions had been made without compliance with the appropriate provisions of the Railway Labor Act in violation of Section 77(n). The reorganization court dismissed the petition. The Third Circuit affirmed. This Court granted certiorari.

In its *Pitney* opinion, this Court first noted that a reorganization court, acting in the capacity of a judicial body in the possession of the debtor's business, has the power and duty to exercise the jurisdiction conferred by the Bankruptcy Act "to control its trustees so as to insure the preservation and proper administration of the debtor's estate." *Id.* at 565. This Court then held that the reorganization court had properly directed its trustees with respect to the substitution of employees, but that it could not *finally* settle the issues between the unions and the trustees because that was the function of the Adjustment Board under the procedures of the Railway Labor Act. Nonetheless,

pending such final determination, the reorganization court had the power to approve the interim arrangements made by its trustees respecting the substitution of employees. Accordingly, the union's petition should have been stayed pending determination of the issues before the Adjustment Board rather than dismissed on the merits. *Id.* at 567-68.

In the present case, the Reorganization Court followed the holding of *Pitney* in all respects. It recognized that final determination of the issues raised before the ICC was the only method of resolving whether the protection agreements should be suspended (App. p. A15). But pending such final determination of those issues, the Reorganization Court properly directed impoundment as a necessary utilization of its supervisory powers over the Debtor's estate to avoid the serious impairment to it that could accrue during the interim period.

The exercise of the supervisory powers of a reorganization court to impound funds pending decision on the merits in another forum was approved by this Court in *Thompson, Trustee, v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). The trustee of a debtor railroad there claimed fee title in a right-of-way over oil-rich land. This claim of fee ownership, and the consequent right to drill for the fugitive oil, was disputed under state law.

In order to prevent irreparable loss to the debtor's estate, the reorganization court authorized the trustee to extract and sell the oil and to impound the proceeds for the rightful owner as determined by the state court. This Court upheld such interim action.

> "We are of opinion that it was not an abuse of discretion for the bankruptcy court to authorize the trustee to protect all interests—so far as it appeared possible to do so—by preserving the oil, from waste and depletion, through its extraction and sale with the net proceeds to be impounded until final determina-

> tion of the controversy over title to the right of way lands.
>
> The verified petition and supporting evidence offered a basis for the District Court's finding that such steps were necessary to protect the estate's possible interest in the oil under the right of way. No other method has been suggested whereby such protection against irreparable loss to the estate of the wandering and vagrant oil could have been better afforded." *Id.* at 482-83.

Pitney and *Thompson* clearly establish that it was a proper exercise of the equitable and supervisory powers of the Reorganization Court to enter Orders Nos. 71 and 101 directing interim impoundment of the protection payments. The supervisory powers exercised in *Pitney* were sustained even though wages and working conditions of employees were involved. The supervisory powers exercised in *Thompson* to prevent irretrievable loss of the oil were equally necessary and proper here to prevent irrevocable loss of assets in the Debtor's estate.

The Sixth Circuit's reversal and vacation of the impoundment orders is in conflict with the principles enunciated in *Pitney* and *Thompson*. In addition, the decision of the Sixth Circuit seriously undermines the supervisory powers of the Reorganization Court by truncating the broad authority it should enjoy to direct the conduct of its Trustees. Without the power in the Reorganization Court to insure the preservation and proper administration of the Debtor's estate, the prospect of successful reorganization of a vital link in railroad transportation is seriously impeded.

2. Contrary To The Principle Of This Court's Nemitz Decision, The Sixth Circuit Held Section 77(n) Of The Bankruptcy Act Applicable To Protection Agreements Imposed By The Interstate Commerce Commission.

In *Norfolk & Western R. R. v. Nemitz,* 404 U.S. 37 (1971), this Court affirmed the Sixth Circuit's determination that Section 77(n) can have no application to protection agreements imposed by the ICC as a condition to approval of a consolidation under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f)(1970).

This Court held in *Nemitz* that a protection agreement entered into by N&W and The Brotherhood of Railroad Trainmen pursuant to the N&W-Nickel Plate consolidation, and later approved by the ICC as part of the consolidation proceedings, could not thereafter be substantially abrogated by the parties. The underlying rationale was that such agreement, once approved by the ICC, became a "condition" of the ICC's approval of the consolidation and, therefore, could not be modified subsequently even though both the railroad and union consented. *Id.* at 43.

The Sixth Circuit had reached a similar conclusion in *Nemitz* and ruled that the affected employees were entitled to the protection set forth in the ICC-approved agreement notwithstanding their own union's subsequent agreement with the railroad to modify such protection. The Sixth Circuit held that under Section 5(11) of the Interstate Commerce Act, 49 U.S.C. §5(11) (1970), the ICC is seized with exclusive jurisdiction in all matters pertaining to labor protection agreements imposed by ICC order pursuant to its approval of a merger, consolidation or inclusion of rail carriers. It further held that the Railway Labor Act, 45 U.S.C. §§151 *et seq.* (1970), does not apply to disputes arising under labor protection agreements within the ICC's exclusive and plenary jurisdiction. In so holding, the Sixth Circuit reasoned as follows:

> "Section 5(11) of 49 U.S.C. provides in part, that 'the authority conferred by this section shall be *exclusive and plenary.*' . . . The cumulative effect of the decisions is that there must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, *the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.*" *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir. 1971). (Emphasis added in part.)

Accord, Brotherhood of Locomotive Eng'rs v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir. 1963).

Yet in spite of the clear view which the Sixth Circuit had of the exclusive jurisdiction of the ICC in *Nemitz*, in this case the appellate court held that the "prescribed procedure" of Section 77(n) should have been followed (App. p. A3).[6] This is so sharp a departure from and so contrary to the principle of its decision in *Nemitz*, as affirmed by this Court, as to be antipodal.

The purpose of Section 77(n) is to give effect to the Railway Labor Act. If the Railway Labor Act does not apply, Section 77(n) can have no application. This is apparent from its text which reads as follows so far as pertinent:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees

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[6] A logical explanation for the changed position of the Sixth Circuit may be found in its erroneous assertion that the order of the Reorganization Court "provided for the suspension of the . . . protection agreements." (App. p. A1). In fact, the order only impounded the payments thereunder.

> *except in the manner prescribed in section 151 to 163 of Title 45, as amended June 21, 1934 [Railway Labor Act]*, or as they may be hereafter amended." 11 U.S.C. §205(n) (1970). (Emphasis added.)

Section 77(n) preserves the procedure of the Railway Labor Act and prevents judges and trustees in control of debtor railroads from disaffirming labor contracts not subject to the sole jurisdiction of the ICC. Section 77(n) cannot apply to ICC-approved labor agreements.

The validity of Trustees' position may be demonstrated by assuming that they agreed with the Unions that Section 77(n) is applicable to the Debtor's protection agreements. Had they done so and then worked out a further agreement suspending the protection payments, with or without the intervention of a mediator under the Railway Labor Act, a situation essentially parallel to *Nemitz* would be presented. Any such further agreement between the Trustees and the Unions would be subject to attack by individual members of the Unions just as in *Nemitz*. The decision of the Sixth Circuit in this case in its assertion that the procedure of Section 77(n) was not followed is clearly incompatible in principle not only with its own decision in *Nemitz* but also the decision of this Court therein.

As this Court's decision in *Nemitz* makes clear, both Section 77(n) and the Railway Labor Act can have no application to protection agreements imposed by the ICC. For the present case, this conclusion is strengthened by the interim nature of the orders entered at trial. This is illustrated by *Pitney, supra,* where a reorganization court approved interim arrangements of the trustees to preserve and protect a debtor's estate even though, as here, rights of employees to monetary payments were temporarily affected pending final determination of the merits in the appropriate forum.

3. Denial By The Sixth Circuit Of The Trustees' Right To Prove Irreparable Harm To Debtor Calls For The Exercise Of This Court's Powers Of Supervision.

Vacation of Orders Nos. 71 and 101 of the Reorganization Court without remand cut off any evidentiary hearing on the major issue of irreparable harm. One of the grounds of reversal below was the alleged absence of an evidentiary basis to support the trial court's exercise of its equitable powers. The Sixth Circuit stated:

> "We do not believe that the District Court could properly wield its equitable powers . . . without having heard testimony on such problems bearing on equity as what represented the status quo and what the effect of suspension of the agreements would be." (App. p. A3).

Yet the Sixth Circuit then denied the Trustees their "day in court." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156 (1963). Instead, it assumed their inability to prove their case as a matter of law by failing to remand for further hearing. This constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

At the hearing before the Reorganization Court the Trustees were prepared, and did offer, to present direct proof of the irreparable harm which would be caused the Debtor by loss of the protection payments pending resolution of whether they should be made.[7] Having before it in the

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[7] The fact that the Trustees intended to adduce proof on irreparable harm is clear from the record. Court of Appeals App. pp. 32 and 67. Very early in the hearing on April 16, 1973, counsel for the Trustees said:

> "If the Court please, on the matter of evidence, we did have some points we thought could not go in by documents, and perhaps 10 minutes of questions of Mr. Tyler at some point—it would greatly shorten our presentation if we had stipulations to the documents of course."

(Footnote continued on following page)

reorganization proceedings a full-length portrait of Debtor's financial problems, the Reorganization Court determined that testimony by the Trustees was not needed. This precluded the Trustees from testifying as to the grave effect loss of these payments would have on the reorganization of the Debtor. This is not a case where a litigant, having full opportunity to present his case, has failed to do so. It is a case where a ruling by the trial court, later held to be incorrect, has prevented a party from presenting evidence to support his claim.

It is a fundamental principle of law that where facts are insufficiently developed in an equitable proceeding, either because the lower court failed to hear evidence relating to a material issue of fact or because the facts underlying the lower court's decision are not apparent from the record, substantial justice on appeal is best served by remanding the action to the lower court with instructions to hear evidence and make findings of fact. *Villa v. Van Schaick*, 299 U.S. 152 (1936). A failure to remand such a case for further evidentiary development denies the unsuccessful party his day in court and his right to develop fully the merits of his case. *Florida Lime & Avocado*

(Continued from previous page)

Later counsel returned to the subject of Mr. Tyler's testifying in the following colloquy:

> "Mr. Stevens: We will [sic-not] submit another brief, but I do have a few questions of Mr. Tyler that I would like to ask.
>
> The Court: What is the nature of the questions?
>
> Mr. Stevens: I think the nature of the questions, your Honor—I wanted to ask him some questions about the effect of the protection agreement and the establishment of the impounded account.
>
> The Court: Well, I think the establishment of the impounded account is a matter of record before the Court, pursuant to my order. It was ordered that it be established in the Society National Bank, which has been done, and as far as the other question, I don't think at this point any additional testimony would be required."

Growers, Inc. v. Paul, 373 U.S. 132 (1963); *Willing v. Binenstock*, 302 U.S. 272 (1937).

In *Villa v. Van Schaick, supra*, New York claimants to the liquidation assets of a surety company were preferred over Minnesota claimants by the Supreme Court of New York. The New York Court of Appeals affirmed. The Minnesota claimants appealed to this Court contending that New York claimants could not be preferred over Minnesota claimants under the Fourteenth Amendment. This Court reversed *and remanded* on the ground that the record was inadequate as to facts underlying the state court's decision. This Court stated:

> "We have frequently said that in the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. In determining what justice does require, we have considered changes, either in fact or law, supervening since the judgment was entered; and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act. *We think that the fundamental principle involved in such action applies as well to cases where the record before us does not adequately show the facts underlying the decision of the state court of the federal question, and opportunity should be given for their appropriate presentation either through amendment of the record or by further proof as the state court may be advised.*" [Citations omitted.] *Villa v. Van Schaick, supra* at 155-56. (Emphasis added.)

Cf. Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939).

The need for a party to have the opportunity to present his case fully, as recognized in *Van Schaick*, was specifically addressed by this Court in *Florida Lime & Avocado Growers, Inc. v. Paul, supra*. In that case, a three-judge district court denied an injunction sought by the ap-

pellant to restrain enforcement of a provision in the California Agricultural Code which had the effect of excluding some Florida grown avocados from California. The appellant had offered, but the court failed formally to admit, evidence relevant to the issue of whether enforcement of the statute was a burden on interstate commerce. On appeal, this Court affirmed on two issues, but reversed *and remanded* on the interstate commerce issue, reasoning that any final decision would effectively deny one or the other party his day in court.

> "Thus the only evidence which would seem to support an injunction on the ground of burden on interstate commerce has never been formally admitted to the record in this case. For this Court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections. To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary. [Citations omitted.] On the other hand, to affirm the District Court would require us to make equally impermissible assumptions as to the state of the record." *Id.* at 156.

This Court has applied this accepted principle of appellate procedure in many parallel and analogous cases. For example, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), the court of appeals reversed a lower court judgment for plaintiff and entered judgment for the defendant based upon a defense which the lower court had stricken without hearing plaintiff's evidence on that issue. This Court reversed *and remanded* stating:

"The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute. *Cf. Fountain v. Filson*, 336 U.S. 681; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; *Cone v. West Virginia Paper Co.*, 330 U.S. 212." *Id.* at 533.

This principle also has been recognized and applied in each of the United States Courts of Appeal. *Sammons v. Colonial Press*, 126 F.2d 341 (1st Cir. 1942); *Tobin v. Edward S. Wagner Co.*, 187 F.2d 977 (2nd Cir. 1951); *City Line Center, Inc. v. Loew's Inc.*, 178 F.2d 267 (3rd Cir. 1949); *United States v. Wimbish*, 154 F.2d 773 (4th Cir. 1946); *Cockburn v. O'Meara*, 141 F.2d 779 (5th Cir. 1944); *Tower Realty Co. v. City of East Detroit*, 185 F.2d 590 (6th Cir. 1950); *Walling v. Goldblatt Bros.*, 128 F.2d 778 (7th Cir. 1942), *cert. denied*, 318 U.S. 757 (1942); *Equitable Life Assur. Soc. v. Mercantile Com. B & T Co.*, 143 F.2d 397 (8th Cir. 1944); *Century Inv. Corp. v. United States*, 250 F.2d 139 (9th Cir. 1957), *cert. denied sub nom., Ester v. United States*, 356 U.S. 950 (1958); *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959); *United States v. Morow*, 182 F.2d 986 (D.C. Cir. 1950).

Finally, the departure by the Sixth Circuit from the accepted norms of judicial procedure is highlighted by the cases which it cited in support of its reversal. Referring to *North American Coal Corp. v. U.M.W.A.*, 497 F.2d 459 (6th Cir. 1974) and *Detroit News Pub. Ass'n v. Detroit Typographical Union*, 471 F.2d 872 (6th Cir. 1972), the Sixth Circuit noted that it had previously "reversed orders entered under the court's equitable powers for fail-

ure to take evidence and make findings of fact on irreparable injury" (App. pp. A3-4).

In *North American Coal Corp.*, the Sixth Circuit reversed an order granting a preliminary injunction, but in fact *remanded* for a rehearing to obtain evidence as to the competing equities of the parties. In *Detroit News*, the evidence had been fully developed at trial and no remand was required.

If, as the Sixth Circuit held, the Reorganization Court erred by not taking testimony from either party, the usual and normal remedy would be to remand with instructions to hear evidence on irreparable harm. Both parties would then have an opportunity to present the proof which each said it had available at the original hearing. By reversing and vacating the orders of the Reorganization Court, the Sixth Circuit has in effect determined the case on its merits without having before it any evidence to support a final determination and has denied the Trustees their day in court to present their case. This grievous departure from the normal course of judicial procedure and the fundamental principle expressed in *Paul* and *Van Schaick*, *supra*, requires that this Court exercise its powers of supervision so as to permit the Trustees an opportunity to prove irreparable harm to the Debtor.

CONCLUSION

Although the issue of suspension of the protection agreements has not been finally resolved, the Sixth Circuit has *finally determined* that there should be no interim impoundment of the payments under those agreements. Its judgment would require disbursal of the funds on hand and substantial erosion of the Debtor's assets should the agreements ultimately be suspended during reorganization. If railroads in reorganization under Section 77 of the Bankruptcy Act are to be restored to viability, orders of a reorganization court protecting their assets, pending adjudication in another forum, must be upheld.

The petition for certiorari should be granted and the supervisory powers of the Reorganization Court recognized and restored.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1974
No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR.,
TRUSTEES OF THE ERIE LACKAWANNA
RAILWAY COMPANY, DEBTOR,
Petitioners,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND CONGRESS OF RAILWAY UNIONS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Opinion of the Sixth Circuit Court of Appeals, July 5, 1974 ..... A1

Judgment of the Sixth Circuit Court of Appeals, July 5, 1974 ..... A5

Order of Court of Appeals on Rehearing, August 8, 1974 ..... A7

Order No. 71 of the United States District Court, Northern District of Ohio, Eastern Division, March 21, 1973 ..... A8

Memorandum and Order No. 101 of the District Court, May 17, 1973 ..... A10

Supplemental Report and Order of the Interstate Commerce Commission in Finance Docket No. 21510, April 29, 1974 ..... A18

Bankruptcy Act—§ 77(a), 11 U.S.C. § 205 (a) A32

Bankruptcy Act—§ 77(n), 11 U.S.C. § 205 (n) A33

Railway Labor Act—§ 6, 45 U.S.C. § 156 ..... A34

Interstate Commerce Act—§ 5(2)(f), 49 U.S.C. § 5(2)(f) A34

Interstate Commerce Act—§ 5(11), 49 U.S.C. § 5(11) A35

APPENDIX

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

(Decided and Filed July 5, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

VS.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio,
Eastern Division.

Before: PHILLIPS, *Chief Judge,* EDWARDS and PECK, *Circuit Judges.*

EDWARDS, *Circuit Judge.* This is an appeal by various of the railway labor unions from an ex parte order, subsequently reaffirmed after hearing, entered by a District Judge in the United States District Court for the Northern District of Ohio, Eastern Division, acting as a Reorganization Court. This order provided for the suspension of

previously negotiated employee protection agreements and the impoundment of funds which would have otherwise been paid to the employees.

This action was taken on petition of the Trustees of the debtor (Erie Lackawanna Railway). The Trustees had previously filed for reconsideration and suspension of these agreements before the Interstate Commerce Commission. Since the District Court's action, the ICC has now heard and decided this petition, finding that "The record in this proceeding fails to provide a basis upon which the Trustees' petition may be granted." ..... I.C.C. ....., Finance Docket No. 21510 (decided April 29, 1974). This decision undercuts the basis upon which the District Court order was entered.

A brief history of this matter indicates that on June 9, 1967, the Erie Lackawanna Railway Company was authorized to be included in the Norfolk and Western Railway Company System by an order issued by the ICC. Subsequently, the Erie Lackawanna Railway Company (debtor) and the bargaining representatives of its employees entered into protection agreements on August 19 and August 29, 1968, which required the debtor to guarantee that none of its employees would be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during their employment. The unions argue that these agreements were *quid pro quo* for certain changes of operating conditions as a result of the merger with the Norfolk and Western which would have the effect of more economical operation with less manpower for the Erie Lackawanna.

Subsequently, on June 26, 1972, the debtor filed a reorganization petition under § 77 of the Bankruptcy Act,

11 U.S.C. § 205 (1970), and on March 20, 1973, the Trustees of the debtor filed a petition for reconsideration of the employee protection agreements before the ICC and the petition before the District Court for the suspension of wage payments required by those agreements.

At oral argument of this appeal the Trustees claimed that their petition before the District Court was designed to preserve the status quo pending determination by the ICC of the petition to reconsider and suspend the protection agreements. Now, however, the Trustees assert their intention to seek reconsideration of the adverse decision of April 29, 1974, of the ICC and seek delay of this court's action on this appeal.

Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1970), says in part:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in §§ 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended."

Clearly, the prescribed procedure was not followed in this case.

Further, the District Judge took no testimony on the question of irreparable harm either from the railroad trustees, who proffered none, or from the labor unions, which did. We do not believe that the District Court could properly wield its equitable powers (assuming they were not restricted by § 77 (n)) without having heard testimony on such problems bearing on equity as what represented the status quo and what the effect of suspension of the agreements would be. In two recent cases this court has reversed orders entered under the court's equitable powers

for failure to take evidence and make findings of fact on irreparable injury. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *North American Coal Corp. v. Local 2262, UMW,* ..... F.2d ..... (6th Cir. 1974) (Decided May 10, 1974).

> "The fatal defects in the decision of the District Court were: (1) its failure to weigh the equities between the parties and to determine whether the employer would suffer more from the granting of the injunction than the Union from its denial, as required by Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970); and (2) the absence of a showing of irreparable harm to employees as mandated by *Boys Markets." Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union, supra* at 875.

Note a similar holding in *North American Coal, supra,* where the parties were reversed.

The judgment of the District Court is reversed and Orders No. 71 and 101 of the Reorganization Court are vacated.

JUDGMENT OF THE SIXTH CIRCUIT COURT OF APPEALS

(July 5, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

VS.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

BEFORE: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and Orders Nos. 71 and 101 of the Reorganization Court are vacated.

It is further ordered that Appellants recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ John P. Hehman
Clerk

ORDER OF COURT OF APPEALS ON REHEARING

(August 8, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

vs.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

Before: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges.*

On receipt and consideration of a suggestion for rehearing in banc; and

No judge of this court having moved for such rehearing and the motion for rehearing having been assigned to the panel which decided the case; and

Noting nothing which had not been previously considered,

Said motion for rehearing is hereby denied.

Entered by order of the Court

/s/ John P. Hehman
Clerk

ORDER NO. 71 OF THE DISTRICT COURT

(March 21, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization
of a Railroad
No. B72-2838

In the Matter of
ERIE LACKAWANNA RAILWAY COMPANY, Debtor

ORDER NO. 71

Upon consideration of the Petition of Trustees Concerning Suspension of Employee Protection Agreement, it is ORDERED:

(1) Upon good cause shown and upon finding that irreparable harm will result to the Debtor's estate unless this Order is entered, the Trustees are hereby directed to suspend the payments provided by the Protection Agreement and related agreements until further order of this Court.

(2) Upon suspension of the payments provided by the Protection Agreement and any related agreements pursuant to this Order, the Trustees are directed to deposit such payments in a special account drawing interest at the maximum available rate at Society National Bank, Cleveland, Ohio, subject to the further orders of this Court.

(3) The Trustees are directed to give notice to Intervenors and other parties in interest of the entry of this

Order, and unless motion to vacate or other pleading is filed by April 2, 1973, this Order shall become final.

(4) This Court reserves further right and jurisdiction over the monies deposited in such special account, and the income derived therefrom, and the right and jurisdiction to make such further orders as this Court shall deem proper concerning the subject matter of this Order.

/s/ Robert B. Krupansky
United States District Judge

MEMORANDUM, OPINION AND ORDER NO. 101 OF THE DISTRICT COURT

(May 17, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization
of a Railroad
No. B72-2838

In the Matter of
ERIE LACKAWANNA RAILWAY COMPANY, Debtor

MEMORANDUM, OPINION AND ORDER NO. 101
RELATING TO HEARING ON MOTIONS
TO VACATE ORDER NO. 71

On June 26, 1972, the Erie Lackawanna Railway Company ("Debtor") filed a Petition for Reorganization with this Court pursuant to §77 of the Bankruptcy Act, 11 U.S.C. §205. This action was precipitated by the Debtor's inability to meet its financial commitments as they became due, attributable in part to the great damage to the Debtor's property and operations inflicted by the "Agnes" floods of late June, 1972.

Approval of the Debtor's Petition vested exclusive jurisdiction over the Debtor's property, wherever situated, in this Court. 11 U.S.C. §205(a); *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Thomas F. Patton and Ralph S. Tyler, Jr., were subsequently appointed Trustees

of the Debtor's property to operate the Debtor's business and to conduct its affairs, subject to the Court's control during the reorganization. 11 U.S.C. §205(c).

On March 20, 1973, the Trustees petitioned the Interstate Commerce Commission (the "Commission") to reopen the proceedings which authorized the merger of the Erie Lackawanna Railway Company into the Norfolk and Western Railway Company's system ("N&W") effective April 1, 1968. The Trustees' Petition requests the Commission's authorization to suspend, during the pendency of the reorganization proceedings, the Agreement for Protection of Employees of Erie-Lackawanna Railroad Company Following Merger of Said Company Into Erie Lackawanna Railway Company (the "Protection Agreement"), and related agreements, which became effective on the merger date.

The Trustees contend that the pre-reorganization Protection Agreement was impressed upon the Erie Lackawanna Railway Company by order of the Commission as a prerequisite to merger into the N&W system to insure the Debtor's employees against possible adverse effect of the merger. They further contend that due to termination of N&W control by the reorganization proceedings, the Protection Agreement is unwarranted.

> . . . the Commission's inclusion order was founded upon the premise that the employees of Erie-Lackawanna Railroad Company would be adversely affected as the result of the vesting of ownership and control of Erie Lackawanna in the N&W system; that the payments provided for in the Protection Agreement and related agreements were based upon the implied condition of the establishment and continuation of such control and ownership; and that, upon the appointment and qualification of the Trustees in the reorganization proceedings

before this Court, the Trustees became seized of the ownership and control of the Debtor's property, thereby terminating N&W's ownership and control of the Debtor's property. Thus, it is the Trustees' position before the Commission that since the underlying conditions of control and ownership by N&W have ceased to exist and will continue to be nonexistent during the course of these reorganization proceedings, there is correspondingly no basis upon which to continue the operation of the Protection Agreement and related agreements during such proceedings. Memorandum of Trustees in Support of Order No. 71, at 5, 6.

The applicable portion of the Commission's order referred to is as follows:

We believe that petitioners' employees should be protected in the same manner as counterpart employees of carriers included in the N&W system by the prior report. Accordingly, the attrition protection here will be restricted to employees who are represented by unions signatory to the attrition agreement and the modification referred to herein and such protection will be applied in the manner hereinafter stated. The attrition protection can be accomplished by further amendment to the agreement, as modified, in which the parties (N&W system carrier, EL, D&H, R&M and RELA) will include therein petitioners' employees who are members of the unions signatory to the original agreement, as modified. As an alternative, the parties may enter into a new agreement, incorporating therein substantially the same terms and conditions as were contained in the original attrition agreement, as modified, together with such changes therein as they deem appropriate. Since the instant proceeding is a continuation of the original N&Y-Nickel Plate unification pro-

ceedings, we believe this method will virtually assure the same treatment for petitioners' employees as is now accorded to their counterparts in the present N&W system. While we have the power to prescribe the necessary conditions, it appears preferable to leave the matter to the parties initially and to require them to submit evidence of agreement with respect to attrition protection within a period of 60 days from the effective date of our order herein. Any agreement, of course, should refer to employee benefits and to obligations under the prior agreement. Failing evidence of agreement within that period, we will prescribe appropriate conditions. Respondent's Exhibit B at 824, 825.

Immediately following the filing of their Petition with the Interstate Commerce Commission, the Trustees petitioned the Court for authority to suspend payments to employees required pursuant to the terms of the Protection Agreement. On March 21, 1973, the Court issued Order No. 71, granting the temporary relief requested, and ordered the accrued funds deposited into a special interest drawing account at Society National Bank, Cleveland, Ohio, under the exclusive jurisdiction and control of the Court, pending a determination by the Interstate Commerce Commission on the issues raised by the Trustees' Petition. The Order further provided for notice to all intervenors and other parties in interest of its entry, and fixed April 2, 1973, as the cut-off date for pleadings in opposition thereto. Motions to Vacate were filed by the following union representatives: The Congress of Railway Unions, the Railway Labor Executives' Association, and the Brotherhood of Locomotive Engineers (the "Unions"). A full and complete hearing on the Motions was accorded interested parties on April 16, 1973.

The Unions, both in their pleadings and oral arguments before the Court, contend that:

1. The Court lacked jurisdiction to enter an order in the nature of Order No. 71, and the Interstate Commerce Commission lacks jurisdiction to modify its previous order;

2. Order No. 71 contravenes §77(n) of the Bankruptcy Act, 11 U.S.C. §205(n), §5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), and the Railway Labor Act, 45 U.S.C. §151, et seq.;

3. In the event that jurisdiction attaches to the subject matter of the proceeding, the Court should stay its hand pending a determination by the Interstate Commerce Commission of the Trustees' Petition for Reconsideration, or alternatively, order the Trustees to resume payments pursuant to the Protection Agreement.

I. Jurisdiction

The Supreme Court has recognized the broad and general equitable jurisdiction and authority inherent in reorganization courts to accomplish the fundamental objectives of railroad reorganization to:

1. Conserve the Debtor's estate for the benefit of its creditors; and

2. Preserve an on-going railroad in the public interest. *See, New Haven Inclusion Cases, supra*, at 420, 421, 431.

Acknowledging that the reorganization Court has exclusive jurisdiction over the Debtor's property pursuant to §77(a) of the Bankruptcy Act, 11 U.S.C. §205(a), and the duty to protect that property in its efforts to accomp-

lish the aforementioned objectives of railroad reorganization, the Supreme Court has upheld the right of a reorganization court to impound funds in the constructive possession of the Debtor where the right to such funds is in dispute, pending a determination by the proper tribunal as to which party should prevail. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

Recognizing the exceptionally broad statutory authority delegated to the Interstate Commerce Commission by Congress to modify and amend its original determinations when the circumstances so warrant, this Court assiduously avoids any act which could be even remotely construed as interfering with such areas of original administrative jurisdiction. 49 U.S.C. §17(6),(7); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970).

It is equally apparent, however, from the pronouncements of the Supreme Court that this Court must exercise its inherent authority pursuant to the Congressional mandate to conserve the Debtor's estate, and preserve an ongoing enterprise in the public interest. This Court concludes that implementing the mandate of Congress dictates the impounding of the funds here in dispute pending the Commission's exercise of jurisdiction to resolve the issues presented by the Trustees' Petition.

II. Statutes

The Court further concludes that the Unions' contention that the language of §77(n) of the Bankruptcy Act, 11 U.S.C. §205(n), prohibits the Court's entry of Order No. 71 is without merit. The pertinent language of that section is clear and unambiguous, and does not apply to protection agreements authorized by the Interstate Commerce Commission.

> No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in §§151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended.

As the Sixth Circuit explained in *Norfolk and Western v. Nemitz*, 436 F. 2d 841, 845, aff'd 404 U.S. 37 (1971), the Interstate Commerce Act confers exclusive jurisdiction upon the Commission to adjust the work and compensation of employees affected by mergers or inclusions, and the provisions of the Railway Labor Act do not apply to the orders of the Commission relating thereto.

The Court finds that Order No. 71 does not change the wages or working conditions of employees as prohibited by §77(n), 11 U.S.C. §205(n). The Court further finds that the section does not restrict the Court in its exercise of its power to provide equitable interim relief to preserve the status quo pending a disposition of the matters before the Interstate Commerce Commission, which are not controlled by the provisions of the Railway Labor Act.

III. Irreparable Harm

Order No. 71 was designed to protect the interests of both the employees and the Trustees by preserving the subject matter in dispute until the Interstate Commerce Commission resolves the issues presented by the Petition of the Trustees, thereby assuring the integrity of the accrued funds, including interest thereon, and allaying even the threat of irreparable harm to either side.

Order No. 71 has preserved the status quo by preventing either party from dissipating the assets pending a final determination of the issues before the Commission. Also, Order No. 71 eliminates the necessity of further costly

litigation by the prevailing party to receive the fruits of its successful efforts.

Denying interim relief would breach the Court's duty to the creditors of the Debtor, and the general public by allowing the Debtor's estate to be depleted before the proper tribunal determined the status of the disputed funds. *Thompson v. Magnolia Petroleum Co., supra.*

Having applied the well established doctrine of "balancing the equities" to the matters before it, the Court finds that the interim relief provided by Order No. 71 is fair and equitable to all concerned. Any inconvenience to either party can be remedied by expeditious action by the Interstate Commerce Commission.

Accordingly, the Motions of the Congress of Railway Unions, the Brotherhood of Locomotive Engineers, and the Railway Labor Executives' Association to Vacate Order No. 71 are denied.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

SUPPLEMENTAL REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION

(Decided April 29, 1974)

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21510

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY—MERGER, ETC.

Upon further consideration, the petition of the Erie Lackawanna Trustees to reopen for further hearing, reconsideration, and suspension of employee protection agreement, denied.

SUPPLEMENTAL REPORT OF THE COMMISSION ON FURTHER CONSIDERATION BY THE COMMISSION:

By report and order of June 24, 1964, 324 I.C.C. 1, this Commission approved, among other things, the merger of the properties and franchises of the New York, Chicago and St. Louis Railroad Company, into the Norfolk and Western Railway Company, subject, among other things, to the imposition of labor protective conditions, the right of various railroads including the Erie Lackawanna Railroad Company (E-L) to seek inclusion at any time within five years, and a retention of jurisdiction for five years to receive inclusion petitions. By supplemental order of June 9, 1967, 330 I.C.C. 780, as modified by orders of August 10, 1967, and September 1, 1967, 331 I.C.C. 22, and by the order of March 14, 1968 (not printed), E-L's petition for inclusion in the N&W System was authorized and directed. The Commis-

sion, in authorizing the E-L inclusion,[1] provided that petitioners' employees be protected in the same manner as counterpart employees of the carriers included in the N&W System by the report in 324 I.C.C. 1, and directed the parties to execute and submit their own protective agreement. The inclusion was consummated on April 1, 1968, and the parties submitted a protective agreement, executed August 19, 1968, and effective as of the consummation date, which incorporated by reference the provision of the original N&W agreement that no railroad employee would be placed in any worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during their employment after inclusion. On June 26, 1972, a petition for reorganization was filed by E-L under section 77 of the Bankruptcy Act, and the reorganization court took jurisdiction over the debtor shortly thereafter. Acting on a request of the Trustees, the court suspended payments due under the protective agreement and ordered that such funds be deposited into escrow.

On March 20, 1973, the Trustees of the E-L filed a petition seeking a reopening of the inclusion proceedings for the purpose of further hearing, reconsideration, and suspension of the operations of the employee protective agreement during the course of the reorganization proceedings. By order of the Commission, dated June 8, 1973, the proceeding was reopened for the limited purpose of oral argument on the issues, and all parties appeared before the entire Commission.

The Trustees contend that the protective agreement is premised on the theory that the employees of E-L could be adversely affected by the line's inclusion in the N&W

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1. 330 I.C.C. 780, 826.

System since it was contemplated that employees could be transferred throughout the N&W System. They further contend that a termination of the N&W control resulting from the pending reorganization proceeding and the elimination of the benefits accruing as contemplated by inclusion, eliminates any basis upon which to continue the benefits provided under the protective agreement and related implementing agreements.

In reply, the Railway Labor Executives' Association (RLEA) urges the dismissal of the petition, alleging the Commission lacks authority to suspend provisions of an employee protective agreement imposed pursuant to section 5(2)(f) of the Interstate Commerce Act. It contends that since the agreement was negotiated by the parties under the provisions of the Railway Labor Act, the agreement and the wages, rules, and working conditions it governs may not be changed except in accordance with the procedures prescribed by that Act. RLEA cites *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971) for the proposition that parties to a labor protective agreement negotiated pursuant to the provisions of the Railway Labor Act may not, by subsequent implementing agreement, substantially reduce the benefits provided by the agreement, which had been imposed by the Commission as a condition of its approval of a merger. Thus, if the principals to such a protective agreement cannot abrogate the rights of employees by mutual agreement, the RLEA reasons that the Commission cannot do so unilaterally at the request of only one of the parties signatory thereto. Further, since it has filed a motion to vacate the reorganization court's order to suspend payments. RLEA prays that the Commission postpone action on the Trustees' petition pending disposition of the same issue by the reorganization court so as to avoid protracted and unnecessary litigation.

The Congress of Railway Unions (CRU) filed a reply requesting that the Commission defer consideration of the Trustees' petition pending disposition by the reorganization court of the motions to vacate its order suspending the payments. CRU urges denial of the petition for numerous reasons: the agreements are collective bargaining agreements which can only be modified in the manner prescribed therein or in the Railway Labor Act; a suspension would effect a substantial change in wages or working conditions of employees in violation of Sections 2, Seventh and Section 6 of the Railway Labor Act, Section 77(n) of the Bankruptcy Act, and the "standard of compensation" for employees by virtue of contracts and conditions imposed by the Commission; the Trustees do not claim that debtor cannot afford the payments required by the collective bargaining agreement; and there is no indication that the estate of the debtor would suffer any hardship from carrying out the contract while a suspension of the payments would cause irreparable injury to the employees of the debtor.

The Trustees filed a response to the labor replies, in which they contend that the statutory law, sections 5(9), 5(11), and 16(6) of the Act, and pertinent case law clearly establish the Commission's continuing and exclusive jurisdiction to reconsider any aspect of a section 5(2) order to reflect changed circumstances and to issue whatever subsequent orders as may be necessary and appropriate. Further, they assert that the Commission specifically retained jurisdiction in its supplemental order of June 9, 1967. The Trustees reject the labor arguments that suspension of payments would violate the Railway Labor Act, Section 77(n) of the Bankruptcy Act, and the Supreme Court's decision in *Nemitz*. First, the Trustees contend that Section 5(11) of the Act pre-empts the application of the Railway Labor Act be-

cause parties entering into a section 5(2) merger transaction are relieved from the operation of all Federal legal restraints, including the Railway Labor Act. Second, they urge that the Bankruptcy Act is not applicable here, inasmuch as that legislation prohibits a judge or trustee, but not the Commission, from changing wages or work rules, except as prescribed in the Railway Labor Act. Finally, the Trustees urge that the Commission should not defer exercising its jurisdiction inasmuch as the issues before the reorganization court and the Commission are different.

On oral argument, the Trustees sought to justify suspension of payments on the theory that the protective agreement was void for failure of consideration. The Trustees viewed the agreement as a continuing bilateral contract, with E-L having the right to transfer its employees throughout the entire N&W System and adversely affected employees having the right to receive compensatory protection payments. It was contended that the filing of the petition in reorganization and commencement of reorganization proceedings constitute a changed circumstance terminating N&W's control of E-L and E-L's right to transfer employees within the N&W System. The Trustees emphasized that the E-L has paid $3,730,000, to date under the contract, but have made only two groups of employee transfers, at Binghamton, N.Y., and Hammond, Ind., to Chicago, Ill. Since the change has destroyed E-L's contract benefits, except as noted, the Trustees urged that consideration had failed and that the agreement is null and void. They proposed, however, to continue making payments to employees adversely affected by the Binghamton and Hammond transfers.

The labor interests, on oral argument, reaffirmed their previously stated position.

One preliminary matter warrants our attention. CRU filed a motion to strike the Trustees' response on the ground that it constitutes a reply to a reply in violation of Rule 23(a) of the Commission's General Rules of Practice. The Trustees argue that they are entitled to reply because the labor pleadings are nothing more than an affirmative attack on the Commission's jurisdiction and a request for deferral of Commission action. In view of our conclusions herein as to jurisdiction and as to the disposition of the Trustees' petition, CRU's motion will be denied.

DISCUSSION AND CONCLUSIONS

The threshold question to be answered before reaching the issue raised here is whether this Commission has the jurisdiction to reopen proceedings to reconsider any aspect of an order issued under section 5(2) to reflect changed circumstances. It is not necessary to rely, as the Trustees would have us do, upon sections 16(6) and 5(11) of the Act, to find a jurisdictional base for action here. The main thrust of those sections is in another direction, though they may not be considered wholly inapplicable. There seems to be little doubt, however, that adequate authority is provided by section 5(9) of the Act:

> *Supplemental Orders by the Commission*
>
> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (1), (2), or (7) as it may deem appropriate . . .

The authority to issue supplemental orders and to suspend or modify orders under section 5(9) with respect to any action this Commission may take under section 5(2) necessarily grants the continuing jurisdiction to reopen proceedings due to changed circumstances, matters related to the

overall public interest, or any other reason we deem appropriate. Any other conclusion would render section 5(9) a nullity and lock the regulatory process into the status quo, prohibiting the Commission from reacting to new developments and thereby frustrating the National Transportation Policy. Compare *American Trucking v. A. T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967).

This issue was considered at length in *Nueces County Navigation District No. 1 Construction*, 330 I.C.C. 717 (1967), where the Commission reasoned as follows:

> . . . Not only does the Commission have jurisdiction under its continuing regulatory power to reopen a proceeding for further consideration, but also under the authority granted in Section 5(9) of the Act to "make such orders, supplemental to any order made under paragraphs (1), (2), or (7) of Section 5 as it may deem necessary or appropriate". Both of the proceedings here considered involved matters falling under the provisions of Section 5(2) and good cause therefor having been shown by applicants, the Commission is authorized to take appropriate action (such as the reopening procedure following herein) to enable it to determine whether the order of November 16, 1960, should be modified or supplemented in any respect . . .
>
> . . . Under Section 5(9) it is contemplated that the Commission might from time to time reexamine a consummated section 5(2) transaction and for good cause shown, modify the terms of its approval order. This possibility of reexamination and modification, as well as the statutory provision establishing it, is an integral part of the Commission's approval of a transaction, no less so than would be the case if specific provision

> therefor was made in the approval order. Consequently, we hold that we have jurisdiction to determine whether particular plans of operation would render the transaction inconsistent with the public interest. If specific plans of operations advanced by either side are brought before us, we can and should rule on them; and if either or both are consistent with the public interest, we must so find . . .

See also *Maintenance Employees v. U. S.*, 366 U.S. 169, 172 note 2 (1961), and *Baltimore & Ohio Railroad Co. v. United States*, 386 U.S. 372, 387 (1967). We adhere to the view expressed above, and believe that the statute not only grants us the authority but also imposes upon us the obligation to be continuously aware of changing situations.

In arguing that the Commission lacks jurisdiction to suspend provisions of an employee protective agreement imposed pursuant to section 5(2)(f) of the Act, RLEA asserts that the agreement was negotiated by the parties in accordance with the procedures of the Railway Labor Act. This contention, which ignores the fact that the Commission's orders in *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Railroad Co.—Merger, Etc.*, 330 I.C.C. 780, 822-826 (1967), required the parties "to submit evidence of agreement with respect to attrition protection . . .," is of no consequence.

Furthermore, RLEA's assertion that the agreement and the wages, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that Act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieves carriers from all other restraints of federal law.

The Railway Labor Act is a Federal Act and is thereby preempted by section 5(11). Thus the Commission may relieve the railroad from the requirements of that Act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2). As the Circuit Court reasoned in *Chicago & North Western Railway Co. v. Brotherhood of Locomotive Engineers*, 202 F. Supp. 277 (S.D. Ia. 1962), *aff'd sub nom., Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F. 2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), in concluding that Congress intended for the Commission to have this power (id. at 431-432):

> to hold otherwise would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.
>
> Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11).

We find nothing in the Railway Labor Act contrary to this conclusion. We also reject RLEA's further contention that the Commission may not unilaterally reduce the benefits afforded an employee under a protective agreement negotiated pursuant to provisions of the Railway Labor Act and imposed by this Commission in the exercise of its duties under section 5(2)(f) of the Interstate Commerce Act. As support for this contention, RLEA cites *Nemitz, supra*. Their reading of *Nemitz*, in our view, is incorrect. It is true that the Supreme Court, citing the Court of Appeals, stated:

> "An Agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially, abrogate employees' rights grounded in an I.C.C. order".

That language, however, in no way affects the ability of this Commission to reduce the benefits agreed upon by the parties if the Commission finds that the negotiated benefits are potentially detrimental to the public interest. See *e.g., Florida East Coast Ry. Co. Reorganization,* 307 I.C.C. 5, 20-21 (1958), *aff'd.* 312 I.C.C. 744, 746-47 (1959), *aff'd. sub nom, In Re Florida East Coast Railway Co.,* 171 F. Supp. 512, 518-519 (S.D.Fla. 1959).

In reaching this conclusion, it should be remembered that the imposition of a particular set of labor protective conditions is a matter within the Commission's discretion. See *I.C.C. v. Railway Labor Executives Assn.,* 315 U.S. 373, 380 (1942); *City of New York v. United States,* 344 F. Supp. 929, 941 (S.D.N.Y. 1972). If the Commission were prevented from substituting a different set of conditions for those decided upon by the parties, even though its evaluation of the public interest revealed the necessity for such a step, its discretion in these matters would be seriously infringed upon.

Finally, there is no right to "attrition" conditions or a prohibition against job changes. The purpose of section 5(2)(f) was not to freeze jobs but to provide compensatory benefits. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-176 (1961). So long as the substituted or modified conditions would satisfy that purpose, the Commission would be properly carrying out its statutory functions.

In maintaining that the payments should be suspended the Trustees assert:

> The Protection Agreement was entered into pursuant to the Commission's inclusion order herein, and was founded upon the premise that the employees of Erie-Lackawanna Railroad Company would be adversely affected as the result of the vesting of ownership and control of the Erie-Lackawanna Railway Company in the Norfolk and Western Railway Company System. Hence, the payments provided for in the Protection Agreement and related agreements are based upon the implied condition of the establishment and continuation of such control and ownership . . .

In our view, this is not so. The payments are based upon an employee being deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto resulting from facility coordinations or other operational changes pursuant to the inclusion of the E-L in the N&W system. With respect to any persons so adversely affected, their right to receive benefits vested when they were affected and has nothing to do with the alleged "implied condition" or with the filing of the bankruptcy petition.[2] The employees herein have already been adversely affected and will continue to be adversely affected during and after reorganization—not as a result of

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2. Should a party be adversely affected by the occurrence of an event anticipated by the existing protective agreement after entry into bankruptcy, it would show that the bankruptcy proceedings did not end the relationship of the E-L and the N&W. Moreover, it should be noted that the Trustees never question the ultimate disposition of the E-L following reorganization but only argue that during the period of reorganization that the payments should be suspended. This argument is based on the claim that the Commission's orders under section 5 are, in effect suspended while the E-L is in reorganization because of an alleged failure of consideration. However, this position seemingly assumes that following reorganization, the Commission's orders will be revitalized as the E-L would once again attempt to effectuate the approved transaction and that only then would the adverse impact of the transaction on the employees be realized.

the reorganization but as a result of the section 5 transactions.

Nor does section 77(n) of the Bankruptcy Act support the Trustees. Rather, it refutes the Trustees' contention when it states in unequivocal terms that: "[n]o judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act . . .'. In other words, the Trustees must accept the continuing vitality of the Commission's labor conditions after entry into bankruptcy, and must likewise accept the continuing jurisdiction of the Commission to modify those orders for good cause shown. The matter would thus boil down to a question of fact with the burden being on the Trustees to demonstrate the need to have the Commission act.

Finally, we must reject the Trustees' argument based on the theory that the protective agreement is void for failure of consideration. If section 5(2)(f) labor conditions are per se rendered inapplicable while the E-L is in bankruptcy because of an alleged failure of consideration, then it would appear that all of the Commission's orders issued under section 5 concerning the E-L inclusion into the N&W system would likewise be nullified—at least for the duration of the bankruptcy proceeding—despite the fact that certain aspects of the inclusion were long ago consummated. The chaos and uncertainty that would result from this theory compel us to reject this aspect of the Trustees' argument without further comment.

In conclusion, the Commission pursuant to section 5(9) of the Act may find that the public interest requires a total or partial suspension or modification of the protective conditions it earlier imposed. In making these findings, the Commission must act within the limitations imposed by section 5(2)(f), especially if four years have not

passed since the effective date of its orders requiring the inclusion of the E-L in the N&W system. Furthermore, since a decision of the Commission would have obvious repercussions in labor relations, the Commission must be aware of these repercussions and consider alternative forms of relief so as to avoid encroaching on the jurisdiction of agencies specifically charged with responsibilities in labor matters. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 170, 173-74 (1962).

The imposition of labor conditions in proceedings under section 5(2) of the Act are mandated pursuant to the provisions of section 5(2)(f). Having once approved a transaction and imposed the required labor conditions upon a finding of consistency with the public interest, and the transaction is consummated on that basis, the parties must be bound by their acts unless a showing of substantial error has been made. The Trustees' arguments are made based on changed circumstances not resulting from the findings we made at the time of approving the transaction under section 5(2), but as a result of extraneous circumstances. Therefore, a substitution of new conditions, suspension of conditions, or elimination of conditions at this time would be contrary to the clear mandate in section 5(2)(f) unless a showing of substantial detriment to the public interest is shown.[3]

The record in this proceeding fails to provide a basis upon which the Trustees' petition may be granted.

An appropriate order will be entered.

Commissioner Murphy did not participate.

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3. It should be recalled that in approving the imposition of attrition protection herein, the Commission noted in its prior report that "it is clear that the imposition of so-called attrition conditions will not impose a significant burden on any of the carriers involved." *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. at 824.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of April, 1974.

Finance Docket No. 21510

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO, & ST. LOUIS RAILROAD COMPANY—MERGER, ETC.

Further consideration of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed its report on further consideration, which report and prior reports in this proceeding 324 I.C.C. 1 and 330 I.C.C. 780, as modified by the report in 331 I.C.C. 22, and the order of March 14, 1968, are made a part hereof:

It is ordered, That the motion of Congress of Railway Unions to strike "response" of Trustees of Erie-Lackawanna Railway Company, be, and it is hereby, denied;

It is further ordered, That, the petition of the Trustees of the Erie-Lackawanna Railway Company, filed March 20, 1973, be, and it is hereby, denied; and

By the Commission.

Robert L. Oswald
Secretary

(SEAL)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

STATUTES

Bankruptcy Act—§ 77 (a)

11 U.S.C. § 205 (a)

(Pertinent text only)

§ 205. Reorganization of railroads engaged in interstate commerce—Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property

(a) * * * Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

* * * * *

Bankruptcy Act —§ 77 (n)

11 U.S.C. § 205 (n)

Claims of Employees for personal injuries and claims of sureties as preferred claims; change in wages or working conditions regulated; moving shops, etc., regulated

(n) In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended. No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

Railway Labor Act—§ 6

45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Interstate Commerce Act—§ 5 (2)(f)

49 U.S.C. § 5(2)(f)

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement

to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Interstate Commerce Act—§ 5 (11)

49 U.S.C. § 5 (11)

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular

meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
DEC 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR, *Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and CONGRESS OF RAILWAY UNIONS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Counterstatement of the Case	3
Argument	6
I. There Is No Conflict of Decision	8
II. The Decision Below Is Clearly Correct	10
Conclusion	12
Appendix A: Section 2 Seventh, Railway Labor Act, 45 U.S.C. § 152 Seventh	1a
Appendix B: Petition to Reorganization Court for Suspension of Montary Wage Guarantee Payments to Employees	2a
Appendix C: Petitioners' Argument to Reorganization Court on Irreparable Harm	6a
Appendix D: Respondents' Proffer of Testimony to Establish Irreparable Injury	7a

TABLE OF AUTHORITIES

Cases:	
Burke v. Morphy, et al. (2nd Cir. 1940), 109 F.2d 572 cert. den. 310 U.S. 635 (1940)	10

Page

Detroit Newspaper Publishers Ass'n. v. Detroit Typographical Union, 471 F.2d 872, 875 (6th Cir. 1972) cert. den. 411 U.S. 967 (1973) 11

Grand International Brotherhood of Locomotive Engineers, et al. v. Morphy et al., 109 F.2d 578 (2nd Cir. 1940) cert. den. 310 U.S. 635 (1940)..... 10

Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37 (1971) 2, 7, 8, 9, 10

Order of Railway Conductors, et al. v. Pitney, et al., 326 U.S. 561 (1946) 2, 7, 8, 9

The Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254 (1970) 11

Thompson, Trustee, v. Magnolia Petroleum Co., 309 U.S. 478 (1940) 7, 8

STATUTES:

Bankruptcy Act:

Section 77(n), 11 U.S.C. Sec. 205(n) 2, 5, 6, 7, 8, 9, 10, 11

Railway Labor Act:

45 U.S.C. Secs. 151 et seq. 2, 10, 11

45 U.S.C. Sec. 152 Seventh 2

Interstate Commerce Act:

Section 5(2) 49 U.S.C. Sec. 5(2) 3, 9

Section 5(2)(f) 49 U.S.C. Sec. 5(2)(f) 2

IN THE

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 500 F.2d 34 (6th Cir., 1974) and is set forth beginning at page A1 of the Appendix to the Petition. Ex Parte Order No. 71 of the District Court is not yet reported but appears on pages A8 and A9 of the Appendix to the Petition. Order No. 101 of the District Court together with Memorandum Opinion, also not reported, is set forth beginning at page A10 of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

This Court is asked to determine whether the Court of Appeals erred in reversing and vacating orders of a District Court entered without the receipt of evidence as to their effect upon the employees involved and which summarily changed the wages and working conditions of railroad employees.

Specifically, the questions presented are:

1. Whether Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n), contains an express limitation upon a reorganization court's equitable powers which prohibited the District Court from summarily changing the wages and working conditions of employees of the Debtor railroad without compliance with the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 et seq?

2. Did the District Court err in refusing to receive testimony from the railroad employees on the question of irreparable harm to them as a result of the issuance of the Court's orders?

3. Do the *Nemitz* and *Pitney* decisions of this Court effectively repeal Section 77(n) of the Bankruptcy Act and Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2)(f)?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition, there is involved herein Section 2 Seventh of the Railway Labor Act, 45 U.S.C. Sec. 152 Seventh, which is set forth in Appendix A hereto.

COUNTERSTATEMENT OF THE CASE

The Petitioners' Statement of the Case while basically accurate, is not complete and in one respect, at least, incorrectly states the effect of the agreement affected by the orders of the District Court.

The Erie-Lackawanna Railroad Company sought merger into the Erie Lackawanna Railway Company, a subsidiary of the Norfolk and Western Railway Company (N&W), pursuant to the provisions of Section 5(2) of the Interstate Commerce Act. The merger was approved by the Interstate Commerce Commission (I.C.C.) on June 9, 1967, subject to the execution of an agreement protecting the interests of the employees of the Erie-Lackawanna Railroad Company who became employees of the Erie Lackawanna Railway Company. The agreement provided that effective on the consummation date of the merger of the Railroad Company into the Railway Company "no employee would be placed in any worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during their employment after inclusion." (App. A19.)[1] Each employee's compensation was guaranteed to continue at a level equal to the employee's average monthly wage for the preceding 12 months. The employees of Erie Lackawanna Railway Company received the benefits of the agreement from April 1, 1968, until March 1, 1973.

On March 20, 1973, the Petitioners *ex parte* requested the Reorganization Court to suspend payments under the agreement as of March 1, 1973, until the I.C.C. could act on the petition filed with that agency on the

[1] "App." references are to the Appendix to the Petition.

same day to suspend the operation of all provisions of the protective agreement during pendency of the reorganization proceedings. A copy of the Petition filed with the Reorganization Court is attached hereto as Appendix B. The Reorganization Court, on March 21, 1973, issued Order No. 71, without hearing or notice to the Respondents (contrary to established Reorganization Court procedure), granting the Petitioners' request based upon a finding of irreparable injury to the estate of the Debtor.[2]

Respondents filed a motion to vacate Order No. 71 and requested a hearing. As noted by the Court of Appeals, which had before it the entire transcript of the hearing on the motion to vacate, the Respondents proffered testimony on the question of irreparable injury but the Petitioners did not. (App. A3.)[3] The Respondents proffered *inter alia* the testimony of "witnesses who will testify that many employees affected by this [order] would have their wages just

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[2] In their petition to the Reorganization Court—which was not served upon the employees' representatives until after it had been approved—the Petitioners did not allege irreparable injury. Indeed, no such allegation was made by Petitioners prior to the filing of their brief with the Sixth Circuit.

[3] Petitioners' footnote attempt to indicate to this Court that Petitioners offered to present testimony on irreparable harm is inadequate. As a reading of the entire transcript of the hearing before the Reorganization Court demonstrates, the Petitioners never claimed that payments to the employees under the protective agreement constituted irreparable injury to the estate of the debtor railroad. To the contrary, counsel for the Trustees "recognized" that on the issue of "irreparable harm", when one is dealing with a body of people . . . [which] very apparently includes many who are of slim financial means [there are] those who might be hardship cases". The entire quotation from the argument of Petitioners' counsel to the Reorganization Court from which these excerpts are taken, is attached to this brief as Appendix C.

about cut in half by the suspension of these payments".[4]

On May 7, 1973, the Reorganization Court denied the motion to vacate and reaffirmed its Order No 71 by the entry of its Memorandum, Opinion and Order No. 101. (App. A10-A17.)

Respondents appealed the orders of the Reorganization Court to the United States Court of Appeals for the Sixth Circuit which reversed the Reorganization Court and vacated Orders Nos. 71 and 101.

Shortly before the Court of Appeals issued its decision, the I.C.C. denied Petitioners' request to suspend operation of the provisions of the protection agreement during the pendency of the reorganization proceeding. (App. A3.) The Petitioners have appealed the adverse I.C.C. decision to a statutory three-judge District Court in the Northern District of Ohio.

The Sixth Circuit Court of Appeals held, first, that I.C.C. denial of Petitioners' request "undercuts the basis upon which the District Court order was entered." (App. A2.)

Secondly, the Court held that the Reorganization Court had violated the following prohibitions of Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n):

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees *except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934* [*Railway Labor Act*], or as they may be hereafter amended." (Emphasis added.)

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[4] The proffer of testimony by Respondents is set forth in Appendix D hereto.

Finally, the Court of Appeals held that even if Section 77(n) was not applicable, the Reorganization Court improperly wielded its equity powers by refusing to hear testimony on what represented the status quo and what, in terms of irreparable injury, would be the effect of suspension.

Since March 1, 1973, a period of over twenty-one months as of the date of the filing of this brief, many employees have been deprived of a substantial portion of their monthly income despite consistent rulings adverse to Petitioners. According to the petition at page 6 thereof, the employees had been deprived of monthly income totaling $1,157,593 as of August 1, 1974.

While the petition states that "in no case have the impounded payments to a given employee constituted all the payments due him or her for a given month" (Petition, p. 6), the Respondents proffered testimony to demonstrate that "many employees affected . . . would have their wages just about cut in half by the suspension of these payments".

ARGUMENT

The Petition makes no claim that it presents important questions of federal law or that the decision below conflicts with decisions of other Courts of Appeal or was decided erroneously upon the facts before it. Petitioners do not even claim a direct conflict between the decision of the Court of Appeals and a decision or decisions of this Court.

Petitioners attempt to justify the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals upon a claimed conflict between the Sixth Circuit's

decision and certain principles enunciated by this Court in *Order of Railway Conductors, et al.* v. *Pitney, et al.*, 326 U.S. 561 (1946); *Thompson, Trustee, etc., et al.* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940); and, *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971).[5]

The Petition closes by calling upon this Court to exercise its powers of supervision over the Sixth Circuit because "vacation of Orders Nos. 71 and 101 of the Reorganization Court *cut off* any evidentiary hearing on the major issue of irreparable harm". (Emphasis supplied.) (Petition, p. 14.) As noted above at page 4, the Petitioners never proffered evidence of irreparable harm. They are now estopped from claiming they were not permitted to introduce evidence on that issue. In any event, it is obvious that the Sixth Circuit could not remand a case for the receipt of evidence on an issue upon which it had found the lower court had no authority to act under Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n).

On the other hand, had the Sixth Circuit held Section 77(n) to be inapplicable to the situation before it, Petitioners' claim of deprivation of due process would be equally specious: Upon vacation of the order of the Reorganization Court, the Petitioners merely would have had to renew before the Reorganization Court their motion to suspend payments; offer their evidence; and, receive their order.

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[5] As will be shown below, the decision of the Sixth Circuit is not in conflict with the principles contained in the *Pitney*, *Thompson* and *Nemitz* decisions. The holdings of those cases are not even applicable to the instant situation.

I.

THERE IS NO CONFLICT OF DECISION

Petitioners are unable to cite any applicable decision of this Court or Courts of Appeals which are in direct conflict with the decision of the Sixth Circuit. The strongest accusation Petitioners are able to level at the Sixth Circuit's reversal and vacation of the orders of the Reorganization Court is that it acted "in conflict with the principles enunciated in *Pitney* and *Thompson*" (Petition, p. 10) and is "contrary to the principle of this Court's *Nemitz* decision." (Petition, p. 11.)

In Petitioners' view, *Pitney* and *Thompson* establish the principle that the proper exercise of the equitable and supervisory powers of a Reorganization Court includes its temporary or interim change of wages and working conditions pending the outcome of related litigation, regardless of the prohibitions of Section 77(n) of the Bankruptcy Act.

Neither of the decisions cited even remotely stands for such a proposition. This Court's decision in *Thompson, Trustee* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940), is inapplicable. It did not involve Section 77(n) of the Bankruptcy Act, nor did it involve wages or working conditions of employees. Furthermore, unlike the actions of the Reorganization Court in the instant case, the action of the *Thompson* court in authorizing the extraction of oil and impoundment of proceeds from the sale thereof, hurt neither party but benefited both.

Order of Railway Conductors, et al. v. *Pitney, et al.*, 326 U.S. 561 (1946), does not override the prohibitions of Section 77(n) in the name of preserving the

Debtor's estate. In the *Pitney* case the prohibitions of Section 77(n) did not apply. There, two unions each claimed that its contract "embodied" the working conditions involved. In order to operate his railroad the Trustee had to choose between them. As a matter of law, therefore, the particular working condition involved could not be held to be "embodied" in either agreement for purposes of Section 77(n) prohibitions until the National Railroad Adjustment Board had resolved the matter by finally interpreting the contracts.

Here, unlike the situation in *Pitney,* the suspended payments *were* "embodied" in the agreements and, therefore, the Section 77(n) prohibitions did apply.[6]

The Petitioners also claim that in *Norfolk & Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971), "this Court affirmed the Sixth Circuit's determination that Section 77(n) can have no application to protection agreements approved by the I.C.C. . . ." (Petition, p. 11). The Sixth Circuit made no such determination in *Nemitz* and this Court, of course, affirmed no such determination. In fact, Section 77(n) of the Bankruptcy Act was not involved in the *Nemitz* case.

This Court did not set aside the requirements of the Bankruptcy Act, the Railway Labor Act or any other statutory provision by its decision in *Nemitz.* That decision merely prohibited a railroad and the representatives of its employees from substantially abrogating protections provided employees by the I.C.C. in approving a transaction pursuant to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2). Certainly, that decision does not, specifically or by implication, authorize a Reorganization Court, temporarily or permanently, to "substantially abrogate" such protection as the Reorganization Court did in this case.

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[6] Petitioners do not challenge the fact that the suspended payments are "wages" within the meaning of Section 77(n).

The *Nemitz* decision did not affect the applicability of Section 77(n). Its only effect upon the Railway Labor Act was to place an additional requirement upon management and labor where they contemplate changes in a bargaining agreement which has been imposed by the Commission for the protection of employees in a Section 5(2) transaction. In such event, following compliance with the provisions of the Railway Labor Act, the parties would have to secure the approbation of the I.C.C. that the changes were fair and equitable and did not "substantially abrogate" rights guaranteed by the agreement provisions imposed by the Commission.

At most, therefore, *Nemitz* would merely add I.C.C. sanction to existing Railway Labor Act requirements in situations involving wage and working conditions changes subject to the prohibitions of Section 77(n).[7]

II.

THE DECISION BELOW IS CLEARLY CORRECT

For well over thirty years the law has been settled that a receiver or trustee in bankruptcy may not change the wages or working conditions of employees of railroads in reorganization or receivership except in accordance with the provisions of the Railway Labor Act, as amended, 45 U.S.C. §§ 151 et seq. *Burke* v. *Morphy, et al.* (2nd Cir. 1940), 109 F.2d 572, *cert. den.* 310 U.S. 635 (1940); *Grand International Brotherhood of Locomotive Engineers, et al.* v. *Morphy et al.*, 109

[7] Petitioners' attempt, at page 12, footnote 6 of their Petition, to "explain" the Sixth Circuit's "changed position" regarding the effect of its *Nemitz* decision is an exercise in semantics. As noted herein, *Nemitz* is not applicable in the instant situation. In any event, the Reorganization Court did "substantially abrogate" the protections imposed by the I.C.C. for the benefit of the employees by suspending those provisions of the agreement requiring payment of monthly wage guarantees to employees.

F.2d 578 (2nd Cir. 1940), cert. den. 310 U.S. 635 (1940).

Petitioners concede that as of August 1, 1974, the employees of the Erie Lackawanna who are embraced within the coverage of the protective agreements had been deprived of at least $1,157,593 in monthly income with which to support their families. (Petition, p. 6.) As indicated in the Respondents' proffer of testimony to the Reorganization Court, those employees have had their monthly wages cut by amounts ranging to 50%. (Appendix C.) No attempt was made by the Petitioners to reduce those wages pursuant to the procedures of the Railway Labor Act, 45 U.S.C. §§ 151 et seq., as required by Section 77(n) of the Bankruptcy Act, 11 U.S.C. Sec. 205(n). The Reorganization Court, at the request of the Petitioners, authorized and directed the Petitioners to suspend the payment of monthly wage guarantees as required by collective bargaining agreements to which the Debtor railroad and the representatives of its employees were parties. The Sixth Circuit correctly concluded that such action was prohibited by Section 77(n).

The Sixth Circuit also concluded correctly that the refusal of the Reorganization Court to receive evidence on the irreparably harmful effects of the issuance or non-issuance of an order of suspension was fatal error. *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 254 (1970); *Detroit Newspaper Publishers Ass'n.* v. *Detroit Typographical Union*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. den.*, 411 U.S. 967 (1973). Indeed, on the face of it, orders which rely for their validity upon factual findings regarding the "balancing of equities" and the existence of "irreparable harm", must be based upon a

factual record supporting such findings. The record in this case contains only Respondents' proffer of evidence of irreparable harm to employees and the Petitioners' deposit in an escrow account of over $1,000,000 withheld from the monthly wages of employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 2 Seventh, Railway Labor Act, 45 U.S.C. § 152 Seventh

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

APPENDIX B

Petition to Reorganization Court for Suspension of Monetary Wage Guarantee Payments to Employees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad

No. B72-2838

In the Matter of

ERIE LACKAWANNA RAILWAY COMPANY, Debtor.

PETITION OF TRUSTEES CONCERNING SUSPENSION OF EMPLOYEE PROTECTION AGREEMENT

THE PETITION of Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Debtor's property in the above matter, respectfully represents that:

1) By petition dated September 28, 1965, the Debtor's predecessor, Erie-Lackawanna Railroad Company, petitioned the Interstate Commerce Commission (Commission) to reopen the proceedings in Finance Docket Nos. 21510-21514 and 21567 for further hearings and consideration for the purpose of finding and determining equitable terms for, and ordering the inclusion of, Erie-Lackawanna Railroad Company in the Norfolk and Western Railway Company System.

(2) After extensive proceedings, the Commission entered an order dated June 9, 1967 approving inclusion of the Erie-Lackawanna Railroad Company in the Norfolk and Western Railway Company System. Such order further provided that the inclusion be accomplished by a merger of the Erie-Lackawanna Railroad Company into the Erie Lackawanna Railway Company (Debtor), a newly organized corporation, which was then and at all times

thereafter has been a wholly owned subsidiary of Norfolk Western Railway Company. Pursuant to such order, the Erie-Lackawanna Railroad Company was merged into the Erie Lackawanna Railway Company (Debtor) on April 1, 1968.

(3) In view of the contemplated change of ownership and control of of the Debtor's system pursuant to the inclusion order, the Commission provided in its order that certain "protection" be afforded the Debtor's employees. More specifically it was provided that the Debtor's employees should be protected in the same manner as counterpart employees of carriers previously included in the Norfolk and Western System pursuant to a prior Commission order entered in 1964 in the Norfolk and Western-Nickel Plate-Wabash unification proceedings. Hence, the Commission ordered the parties to submit evidence to it of agreement with respect to such protection within sixty days from the effective date of the inclusion order, and failing evidence of such agreement within that period, the Commission would prescribe appropriate conditions.

(4) In accordance with the Commission's directions concerning employee protection, the Debtor and the Railway Labor Executives' Association, representing the affected labor unions in the Debtor's system, entered into an agreement dated August 19, 1968 entitled "Agreement for Protection of Employees of Erie-Lackawanna Railroad Company Following Merger of Said Company Into Erie Lackawanna Railway Company" (Protection Agreement). The effective date of the Protection Agreement is April 1, 1968, and its essential terms require that the Debtor guarantee that none of its employees shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, at any time during their employment. Certain related agreements, including implementing agreements, were entered into pursuant to the Protection Agreement.

(5) The Trustees believe and, therefore, allege that the Protection Agreement entered into pursuant to the Commission's inclusion order was founded upon the premise that the Debtor's employees would be adversely affected as a result of the vesting of ownership and control of the Debtor's system pursuant to the inclusion order in Norfolk and Western Railway Company; that the payments provided for in the Protection Agreement and related agreements are based upon the implied condition of the establishment and continuation of such control and ownership; that upon the appointment and qualification of the Trustees in the reorganization proceedings herein, they became seized of the ownership and control of the Debtor's property, thereby terminating the ownership and control of Norfolk and Western Railway Company; and that accordingly since the underlying conditions of control and ownership by Norfolk and Western Railway Company have ceased to exist and will continue to be non-existent during the course of these proceedings, there is correspondingly no basis upon which to continue the operation of the Protection Agreement and related agreements during these proceedings.

(6) The payments provided by the Protection Agreement and related agreements, which are accruing at the current rate of approximately $115,000 per month, or about $1.4 million per year, and will continue indefinitely, should be suspended during the course of these proceedings. A determination to that effect is being sought by the Trustees in proceedings recently commenced before the Commission.

(7) The Trustees believe and, therefore, allege that pending a determination of such matter before the Commission, or before any other body or tribunal in proceedings related thereto, the payments otherwise provided to be made pursuant to the Protection Agreement and related agreements should be suspended and deposited in a special account drawing intrest at the maximum available rate at

Society National Bank, Cleveland, Ohio, subject to the orders of this Court.

(8) The Trustees believe and, therefore, allege that the matters for which authority is requested by this petition will be in the interest of the Debtor's estate and of ultimate reorganization; and that the same will not unduly or adversely affect the public interest.

WHEREFORE, the Trustees pray that an order be entered herein:

(1) Authorizing the Trustees to suspend the payments provided by the Protection Agreement and related agreements until further order of this Court;

(2) Directing that the payments provided for by the Protection Agreement and any related agreements be deposited in a special account drawing interest at the maximum available rate at Society National Bank, Cleveland, Ohio, subject to the orders of this Court.

(3) Granting such other and further relief as this Court deems appropriate.

THOMAS F. PATTON and
RALPH S. TYLER, JR.
Trustees of the Property of
the Debtor

/s/ By RALPH S. TYLER, JR.
Ralph S. Tyler, Jr.
One of the Trustees

March 20, 1973

GARY L. BRYENTON
Counsel for Trustees

APPENDIX C

Petitioners' Argument to Reorganization Court on Irreparable Harm

(Transcript of Hearing on Motion to Vacate Order No. 71 at pages 55 and 56)

Now, when we speak of irreparable harm, we, on behalf of the trustees, recognize of course that when one is dealing with a body of people, people as large as two thousand, I think, approximately, that number, plus, received payments in the calendar year which would have closed February 28, under the agreements, there will be individual hardships. That, just as a matter of percentages, would inevitably be true, I suppose; but what we are concerned with in these proceedings, viewing the reorganization overall, is the preservation of the Erie-Lackawanna Railway as a going concern, one which will be able to furnish employment, indeed to the very men involved, as those who might be hardship cases; and we have to consider whether or not it isn't reasonable to impound for what we hope will be a relatively short time, the payments under those agreements until it is determined whether or not the agreements themselves can be suspended, because by the very arguments which the opposition has adduced, it is proof certain that the trustees could never recoup payments aggregating a million three hundred thousand dollars a year from this body of men which, without any suggestion of criticism, very apparently includes many who are of rather slim financial means, so that to say that this railway which is in the process of reorganization, which we all hope will emerge as a thriving, growing concern, should pay out a million three hundred thousand dollars a year with, I would say, no practical hope of recouping it, must weigh very strongly against individual cases of personal hardship.

APPENDIX D

Respondents' Proffer of Testimony to Establish Irreparable Injury

(Transcript of Hearing on Motion to Vacate Order No. 71, at pages 40-41)

Now, insofar as irreparable injury is concerned, we have witnesses who will testify that many employees affected by this would have their wages just about cut in half by the suspension of these payments. Some of these employees would be reaching retirement age, and upon retirement, they would be gauged in terms of their benefits by the monies that they were receiving at the time of the retirement; so that this would forever affect the annuity they would receive from the railroad retirement board.

Many of the employees have made commitments with regard to the purchase of homes and automobiles and appliances and that sort of thing, based upon the fact that they had this minimum wage guarantee; and as a result of something the railroad wanted and not them.

The elimination of these payments will permit the carrier, for example, to force employees to assign jobs at lower pay. They won't do it now. They don't do it now, because the man has a minimum wage guarantee that they have to pay anyway, but without that wage payment, they would force them into these lower paying jobs, and any grievance the man might have with regard to violation of regular rules agreement would probably take three years to have worked through arbitration.

Now, all of these things will happen, and the evil which we see in the suspension of these payments, pending the Commission acting on the suspension of these payments, is that the trustee is the moving party at the Commission, and as the moving party, it is more in control, at least in the movement of how the case will progress; and as long as these payments are suspended, they will be in no hurry.